

***5 Official Opinions of the Compliance Board 28 (2006)***

**“MEETING” – DISCUSSION OF PRIOR PUBLIC SERVICE  
COMMISSION RULING IN CONTEXT OF ONGOING  
LEGISLATIVE DEBATE, HELD TO BE A MEETING  
SUBJECT TO THE ACT**

May 11, 2006

*The Honorable Nathaniel J. McFadden  
Maryland Senate*

*Mr. Tom Marquardt  
Executive Editor  
The Capital*

The Open Meetings Compliance Board has considered your respective complaints that the Public Service Commission (hereafter “PSC” or “the Commission”) violated the Open Meetings Act by holding a closed meeting with members of the Governor’s staff on March 14, 2006. For the reasons set forth below, the Compliance Board finds that the Act applied to the March 14 gathering and was violated.

**I**

**Complaints and Response**

By letter of March 15, 2006, Mr. Marquardt complained that “the Public Service Commission held an illegally closed meeting on March 14, 2006 with Gov. Robert Ehrlich.” The complaint reflected an understanding that “four members of the five-person commission met with the governor in his office to discuss plan to moderate a proposed rate increase by Baltimore Gas and Electric.” Mr. Marquardt contended that the meeting was not announced and the procedures required by the Open Meetings Act to close it had not been followed. By letter of March 16, 2006, Senator McFadden identified the meeting as having occurred between “the Public Service Commissioners with [Chief of Staff] Chip DiPaula and other top aides of

the Governor ....” Senator McFadden expressed the concern that the meeting had violated the Act.<sup>1</sup>

In a timely response on behalf of the PSC, Susan Stevens Miller, the Commission’s General Counsel, denied that the Act had been violated. Ms. Miller laid out a chronology of events, which we summarize as follows:

“On March 13, 2006, [Commission] Chairman Kenneth D. Schisler met with members of the Governor’s staff to explain the [Commission’s] recently issued Baltimore Gas & Electric Company (‘BGE’) Rate Stabilization Order and the recently announced rate increases ....” Because the Governor’s staff requested detailed information about the rate increases that Chairman Schisler did not have with him, he offered to provide the information the next day. Then, on March 14, Chairman Schisler asked Commissioner Freifeld to assist in developing the information and to meet in Annapolis to help explain the data to the Governor’s staff. Another member of the Commission, Commissioner Boutin, was already in Annapolis on March 14 for one-on-one meetings with legislators to explain the BGE order.

At 12:40, Chairman Schisler and Commissioner Freifeld met in the waiting area on the second floor of the State House. Before the meeting began with the Governor’s staff, Chairman Schisler called Commissioner Boutin by cell phone to see if wanted to participate in the discussion. “As it turned out, when the Chairman reached Commissioner Boutin by cell phone, he was in the State House canteen with Commissioner Smith. Chairman Schisler was unaware up until that moment that Commissioner Smith also was in Annapolis. Commissioners Boutin and Smith elected to join the Chairman and Commissioner Freifeld for the 1:00 p.m. meeting.”

The substance of the meeting was described as consisting “solely of a discussion regarding the previously issued decision of the Commission regarding the BGE Rate Stabilization Plan and the previously announced rates. The Governor’s staff was provided an explanation of the plan as well as the data regarding bill impacts and other information regarding the financial impacts of the adopted plan.”

Having set forth the facts, the Commission’s response argued that this gathering in the State House was not a “meeting” under the Act, because it did not involve “the consideration or transaction of public business.” §10-502(g) of the State

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<sup>1</sup> Senator McFadden’s complaint also expressed concern about the exclusion from this meeting of one Commissioner, Mr. Harold Williams. Insofar as Mr. Williams may have a right to participate in Commission meetings, such a right would be based on the PSC statute or the common law applicable to public officials, not the Open Meetings Act. Consequently, the matter is outside the jurisdiction of the Open Meetings Compliance Board, and we do not comment on it.

Government Article, Maryland Code.<sup>2</sup> This is so, the response contended, because “the purpose of the meeting was to explain the previous decision of the Commission and the rate impact of that decision. This was not a meeting for the Commission to deliberate and decide. The Commission decision was rendered previously and nothing remained for the Commission to deliberate on. The purpose of this meeting was not to conduct public business. With regard to [the] BGE rate stabilization plan there was no public business left for the Commission to conduct.”

## **II**

### **Analysis**

The Commission does not suggest that it complied with any of the provisions of the Open Meetings Act in connection with the session in the Governor’s Office on March 14. Evidently, the public was neither given notice of the session nor afforded an opportunity to observe it. Consequently, the issue is whether the Commission was holding a “meeting,” as that term is used in the Act. If it was a meeting to which the Act applied, the Commission violated it. “Except as otherwise expressly provided in this subtitle, a public body shall meet in open session.” §10-505.<sup>3</sup> If it was not a meeting, as the PSC contended, the Act did not apply and there could have been no violation.

A public body “meets” when it “convene[s] a quorum of [the] public body for the consideration or transaction of public business.” §10-502(g). Here, there is no doubt that a quorum was convened. That the simultaneous presence of four Commissioners was apparently not planned is immaterial. What matters is that they in fact did convene at 1:00 p.m. on March 14. 3 *OMCB Opinions* 30 (2000). Nor is there any suggestion that the Commissioners were there simply as individuals in the setting of a larger group, without the interaction among public body members that amounts to the convening of a quorum.<sup>4</sup> Hence, the determinative point is whether the Commissioners were engaged in “the consideration or transaction of public business” on March 14.

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<sup>2</sup> Except as otherwise indicated, all statutory references are to the State Government Article.

<sup>3</sup> Although some gatherings that qualify as “meetings” are nonetheless excluded from the Act, the Commission has advanced no argument of this kind.

<sup>4</sup> This factor distinguishes the case cited in the Commission’s response, *Ajamian v. Montgomery County*, 99 Md. App. 665 (1994), *cert. denied*, 334 Md. 631 (1994), which involved the presence of individual members of a public body at a large political party meeting.

We agree with the Commission that, under some circumstances, a public body is not engaged in the consideration or transaction of public business when it is merely explaining and responding to questions about a prior decision. If the PSC Commissioners went to a neighborhood meeting to explain their decision about the BGE rate increase, they would not be in a meeting subject to the Act. *City of New Carrollton v. Rodgers*, 287 Md. 56 (1980).

In *this* context, however, we disagree with the suggestion that the PSC's presentation about its prior and highly controversial decision was not the conduct of public business. On March 14, the Commissioners were not at a neighborhood meeting, but rather in the Governor's Office in the middle of the legislative session. The Commission's role in approving BGE's plan for increased rates was at the heart of a political furor. *That very afternoon*, the House Economic Matters Committee was holding a hearing on two bills (House Bills 1334 and 1712) that were directly related to the BGE rate increase. That same afternoon, the Senate Finance Committee was likewise holding hearings on four such bills (Senate Bills 814, 1048, 1051, and 1078). One House bill on the topic, House Bill 1525, had been heard and was awaiting a report from the Economic Matters Committee. Two other Senate Bills, 972 and 1050, were scheduled for a hearing the following week.

To be sure, the March 14 session may not have involved a future PSC "proceeding" under the Public Utility Companies Article. Nevertheless, the Commission is not solely a regulator. By statute, it has a key advisory role on legislation related to its jurisdiction. §2-116(b) of the Public Utility Companies Article. On March 14, the Commissioners were imparting information about a decision that was inextricably intertwined with an ongoing policy-making process, one with potentially significant impact on the PSC. The Commissioners' description of their prior decision and its impact on consumers was intended to shape the outcome of the legislative process. The past really can be prologue, and how one describes the past is itself a policy argument. To consider the earlier PSC order in isolation, as suggested in the Commission's response, would ignore the reality of an ongoing process in which the PSC clearly had a stake.

What the Commission had already done about the BGE rate increases was crucial background information to the pending issue of what the Governor or the Legislature might want to do about those increases, and therefore can only be characterized as "the consideration or transaction of public business." As we long ago wrote, "The imparting of information about a matter ... constitutes the 'consideration or transaction of public business' with respect to that matter.... A briefing is often an important part of the process by which policy is made." 1 *OMCB Opinions* 35, 36 (1993).

**III**

**Conclusion**

The Open Meetings Compliance Board finds that the Public Service Commission violated the Open Meetings Act by failing to comply with the Act's requirements when it met with the Governor's staff on March 14, 2006.

OPEN MEETINGS COMPLIANCE BOARD

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